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In The

Supreme Court of the United States

GEIER, ET AL.,

Petitioners,

v.

AMERICAN HONDA MOTOR COMPANY, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

DAVID OVERLOCK STEWART
Counsel of Record
THOMAS M. SUSMAN
MATTHEW J. MARINO
ROPES & GRAY
1301 K Street, NW
Suite 800 East
Washington, DC 20005-3333
202-626-3900

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INTEREST OF AMICUS CURIAE

The Business Roundtable is an association of chief executive officers of leading corporations with a combined workforce of more than 10 million employees in the United States. The chief executives are committed to advocating public policies that foster vigorous economic growth and a dynamic global economy.[1] The companies represented in The Roundtable engaged in a wide variety of businesses. These businesses are involved in litigation in federal and state courts and administrative agencies across the United States. In many instances, they are subject to inconsistent or even conflicting regulatory requirements of different states. For these businesses, continued economic success requires effective, uniform, and predictable national standards in important areas of law.

This brief supports the respondents, and argues that there should be no presumption against preemption of state law. Such a presumption has not been applied consistently by this Court and is contrary to the Framers' purpose in adopting the Supremacy Clause. By rejecting that presumption, this Court can realize the original intent to give Congress the powers to nurture a vibrant national economy with uniform legal standards.

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[1] Pursuant to Rule 37, both petitioners and respondents have consented to filing of this brief in letters that are on file in the Clerk's office. The undersigned counsel alone have authored this brief, and no other person has made a monetary contribution to its preparation.

SUMMARY OF ARGUMENT

This Court's analysis of preemption under the Supremacy Clause has sometimes included a presumption against the preemption of state laws, and sometimes not. When articulated, that presumption customarily has not been accompanied by any explanation of its constitutional foundation. Petitioners rely heavily on that presumption in this case, yet similarly provide no reasoned basis for presuming that state law is not preempted. *See, e.g.*, Brief for Petitioners at 17. This inconsistently applied presumption should be reconsidered and abandoned.

First, a presumption against federal preemption flatly contradicts this Court's correct insistence that congressional intent is the "touchstone" of preemption analysis. A presumption against preemption necessarily defeats that touchstone. Since congressional intent should control preemption analysis, this Court should construe congressional enactments without placing any thumbs on the interpretative scales.

Second, nothing in the text of the Supremacy Clause, or the deliberations of the Framers, or the federal structure of the Constitution, supports the judicial creation of a presumption against preemption of state laws. Because of their sharp distrust of state governments and state courts, the Framers directed through the Supremacy Clause that the federal government shall not be crippled by state encroachments on its power, as occurred during the Confederation years. The Framers' commitment to restraining state powers militates strongly against any presumption in favor of state laws. This Court should not create limits on federal powers that were neither written

into the Constitution nor contemplated by the Framers. As it has in many cases over the years, this Court should analyze the preemption of state law as a straightforward question of statutory interpretation, without any presumption in favor of, or against, state law.

ARGUMENT

I. The Inconsistently Applied Presumption Against Preemption Of State Law Undermines Congressional Intent As The "Touchstone" Of Preemption Analysis

Under the Supremacy Clause, "the purpose of Congress is the ultimate touchstone" in determining whether state law has been preempted. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). Despite that statement, *Medtronic* embraced a broad presumption against preemption (518 U.S. at 485):

> in all preemption cases, and particularly those in which Congress has legislated . . . in a field which the states have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (internal quotation marks omitted)).

Petitioners and their supporting *amici* rely heavily on this presumption. *See, e.g.*, Brief for Petitioners at 17, 50; Brief of Association of Trial Lawyers of America at 9-10; Brief of States of Missouri, *et al.* at 9-10.

This Court has not directly confronted the inherent contradiction between those two pronouncements. Since the purpose of Congress is truly the "touchstone" of preemption analysis, a presumption against preemption can only lead the Court away from that touchstone, substituting instead a bias in favor of preserving state law.

In addition, this Court has not applied that presumption consistently. In a variety of decisions involving the preemption of state common law, the Court has made no mention of any such presumption.

For example, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984), found that a state common law claim was not preempted, and used no language suggesting a presumption against preemption. *See also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 57 (1987) (holding state common law claims preempted by ERISA without mention of presumption against preemption). Many decisions under the National Labor Relations Act also have addressed the preemption of state law claims without employing a presumption against preemption. *E.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) (bad faith handling of insurance claim); *Farmer v. United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 (1977) (intentional infliction of emotional distress claim); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) (libel claim); *International Union, United Auto, etc. v. Russell*, 356 U.S. 634 (1958) (wrongful interference with occupation claim).

The leading case proclaiming a presumption against preemption, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), announced the "assumption" that the state's police powers are not superseded by federal law unless

that is the "clear and manifest purpose of Congress." Although *Rice* found that the state warehouse regulations at issue were partially preempted, it has been cited almost formulaically in support of a presumption against preemption. *E.g., Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). Neither those rulings, nor *Rice*, provide a reasoned analysis of the constitutional basis for that presumption.

Moreover, in the fifty years since *Rice* the Court has issued a wide range of preemption decisions that never refer to a presumption against preemption of state statutes and regulations, resolving the preemption question before the Court through ordinary statutory construction. *E.g., Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); *American Airlines v. Wolens*, 513 U.S. 219 (1995); *Morales v. Trans World Airlines*, 504 U.S. 374 (1992); *Norfolk & Western R. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). In fact, this Court's early preemption rulings never referred to any presumption that state law is not preempted by federal laws. *E.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 343-44 (1816); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

A presumption of such uncertain provenance and such inconsistent application should be reexamined and abandoned by this Court. There is no constitutional basis for it.

II. A Presumption Against Preemption Is Not Supported By The Text Or Purpose Of The Supremacy Clause, Or The Constitutional Structure

The Supremacy Clause proclaims the preemption of state laws that conflict with federal law (U.S. Const., Art VI, cl. 2):

> This Constitution, and the Laws and Treaties of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The text is clear: Federal law is supreme and state court judges are specifically instructed to respect that supremacy, no matter what state law may provide.

The proper federal-state relationship was at the center of many of the constitutional debates in 1787. The delegates to the Philadelphia Convention deliberated at length over how to construct a strong national government while leaving proper scope to the states. The constitutional debates reinforce three key principles about preemption that are embodied in the Supremacy Clause.

> *First*, the federal government must be guarded from state encroachments on its authority.
>
> *Second*, the Framers were skeptical of claims of state sovereignty and harbored a particular distrust of the state courts.

> *Third*, the Framers accorded to the federal judiciary the principal responsibility of balancing federal and state authority.

Each of these principles is opposed to a presumption against preemption. Moreover, the federal structure does not, by itself, justify such a presumption. Because the Supremacy Clause assigns to this Court a special duty to protect the national government from state encroachment, that presumption has no place in preemption cases.

A. Opening Debates: Protecting the Federal Government From the States

The Philadelphia Convention was prompted by concern over the weakness of the central government under the Articles of Confederation, and the excessive powers of the states. *See* Madison, Notes of Debates in the Federal Convention of 1787 14 (convention triggered by "the imbecility and anticipated dissolution of the Confederacy"). The question of federal supremacy was at the center of the opening proposal by Edmund Randolph known as the "Virginia Plan." In presenting this proposal on May 29, 1787, Randolph enumerated the defects of the Articles of Confederation (Madison at 29-30 (emphasis added)):

> 1. that the confederation produced no security against foreign invasion . . . [and] *particular states might by their conduct provoke war without controul* . . .
>
> 2. *that the federal government could not check the quarrels between states, nor a rebellion in any* . . .

* * *

> 4. *that the federal government could not defend itself against the incroachments from the states.*
>
> 5. *that it [the confederation] was not even paramount to the state constitutions, ratified, as it was in many of the states.*

Randolph's fourth point reflected the Framers' overriding concern that the new federal government must be protected from state encroachments on its power and authority. George Mason of Virginia echoed Randolph's views the next day, taking Randolph's point one step further. Mason "observed that the present confederation was not only deficient in not providing for coercion & punishment agst. delinquent States; but argued very cogently that punishment could not in the nature of things be executed on the states collectively, and therefore that such a Govt. was necessary as could directly operate on individuals[.]" 1 Farrand, The Records of the Federal Convention of 1787 34.

The need for a federal judiciary to control state encroachments also emerged early in the deliberations. On June 5, John Rutledge of South Carolina moved to deny Congress the power to establish inferior federal courts. Madison sprang to the defense of federal courts and scorned the state courts (1 Farrand at 124 (emphasis added)):

> unless inferior [federal] tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree; that besides, an appeal would not in many cases be a

> remedy. *What was to be done after improper Verdicts in State tribunals obtained from the biassed directions of a dependent Judge, or the local prejudices of an undirected jury?* To remand the cause for a new trial would answer no purpose . . . [.]

Influential delegates shared Madison's concern that the states would cripple federal authority. On June 6, James Wilson rose (1 Farrand at 137):

> [Wilson] saw no incompatibility between the national & State Govts. provided the latter were restrained to certain local purposes; nor any probability of their being devoured by the former. In all confederated systems antient & modern the reverse had happened; the Generality being destroyed gradually by the usurpations of the parts composing it.

Wilson returned to this theme the next day, asserting that "he did not see the danger of the States being devoured by the Nationl. Govt.; [O]n the contrary, he wished to keep them from devouring the national Govt." 1 Farrand at 153.

The need to reinforce the federal government against state encroachments led Charles Pinckney of South Carolina to move, on June 8, for a congressional veto over state laws. Pinckney argued (1 Farrand at 164):

> the States must be kept in due subordination to the nation; that if the States were left to act of themselves in any case, it wd. be impossible to defend the national prerogatives, however extensive they might be on paper; that the acts of Congress had been defeated by this means . . . [.]

Madison quickly supported the motion, echoing the themes Wilson had articulated (1 Farrand at 164-165):

> Experience had evinced a constant tendency in the States to encroach on the federal authority; to violate national Treaties, to infringe the rights & interests of each other; to oppress the weaker party within their respective jurisdictions. . . . This prerogative of the General Govt. is the great pervading principle that must controul the centrifugal tendency of the States; which, without it, will continually fly out of their proper orbits and destroy the order & harmony of the political system.

See also id. at 167 (John Dickinson of Delaware) (same).

Wilson used a colorful image to support Pinckney's proposal. He argued that after an initial show of cooperation among the states under the Articles of Confederation (*id.* at 166):

> No sooner were the State Govts. formed than their jealousy & ambition began to display themselves. Each endeavoured to cut a slice from the common loaf, to add to its own morsel, till at length the confederation became frittered down to the impotent condition in which it now stands.

The congressional veto was not adopted at that time, *see* 1 Farrand at 171-73, but surfaced again on June 13 as Article 6 of the report of the Committee of the Whole on the Virginia Plan. Article 6 stated that "the Natl. Legislature ought to be empowered to . . . negative all laws passed by the several States contravening in the opinion of the National Legislature the articles of Union, or any

treaties subsisting under the authority of the Union." 1 Farrand at 236.

A competing framework for the new government was unveiled on June 15, when William Paterson presented the New Jersey Plan, which was designed to protect state powers and did not provide for lower federal courts. 1 Farrand at 242-245. Madison vehemently opposed the New Jersey Plan as unwisely undermining federal powers (1 Farrand at 316-322):

> 2. Will it prevent encroachments on the federal authority? A tendency to such encroachments has been sufficiently exemplified among ourselves, as well as in every other confederated republic antient and Modern. . . .
>
> 3. Will it prevent trespasses of the States on each other? Of these enough has been already seen. . . . The plan of Mr. Paterson, not giving even a negative on the Acts of the States, left them as much at liberty as ever to execute their unrighteous projects agst. each other.

B. The Framers' Ambivalence Towards State Sovereignty

After the New Jersey Plan was quickly set aside, *see* 1 Farrand at 322, the delegates returned to the question of state sovereignty, with Alexander Hamilton urging the outright abolition of the states. *Id.* at 323. Others offered more tempered views. Rufus King of Massachusetts argued that once a national consolidation occurred, the states would not be sovereign:

> [I]f the Union of the States comprises the idea of a confederation, it comprises that also of consolidation. A Union of the States is a union of the men composing them, from whence a *national* character results to the whole. . . . If the States therefore retained some portion of their sovereignty, they had certainly divested themselves of essential portions of it.

Id. at 323-324 (emphasis in original). King "doubted much the practicability of annihilating the States; but thought that much of their power ought to be taken from them." *Id.* at 324; *see id.* at 467 (E. Gerry of Massachusetts) ("we never were independent states, were not such now, & never could be even on the principles of the Confederation").

The delegates then debated the role of the states in selecting the national legislature. As described by William Johnson of Connecticut on June 21, the Wilson/Madison position was "to leave the States in possession of a considerable, tho' a subordinate jurisdiction." *Id.* at 355. He asked how that should be achieved in determining representation in the national legislature. In responding, Wilson emphasized that he "conceived that in spite of every precaution the General Govt. would be in perpetual danger of encroachments from the State Govts." *Id.* at 356.

Madison also emphasized to Johnson the need to protect the federal government. He agreed with Wilson that "there was 1. less danger of encroachment from the Genl. Govt. than from the State Govts. 2. that the mischief from encroachments would be less fatal if made by the former, than if made by the latter." *Id.* Madison stressed

that the "great objection" against abolishing the states "was that the Gen'l Gov't could not extend its care to all the minute objects which fell under the cognizance of the local jurisdiction." The risk, then, was not "abuse" by the national government, but "imperfect use that could be made of [its power] throughout so great an extent of country." *Id.* at 357. In short, under the new Constitution the state governments would be a convenience, not competing sovereigns.

C. The Federal Judiciary Must Control State Encroachments

On July 17, the delegates returned to the proposed congressional veto of state legislation. Roger Sherman of Connecticut proposed a compromise, observing that "it would be difficult to draw the line between the powers of the Gen'l Legislatures and those to be left with the States." Sherman proposed (2 Farrand at 25):

> to make laws binding on the people of the United States in all cases which may concern the common interests of the Union; but not to interfere with the Government of the individual States in any matters of internal police which respect the Govt. of such States only, and wherein the General welfare of the U. States is not concerned.

Like Madison and Wilson, Sherman thus suggested two distinct areas of government action: any federal law addressing "the common interests of the Union" would be supreme; matters of "internal police" would be left to the states so long as no national interest was implicated.

This critical debate ultimately was resolved along the lines proposed by Sherman and Gouverneur Morris of Pennsylvania. Morris argued forcefully that the congressional veto was "likely to be terrible to the States and not necessary, if sufficient legislative authority should be given to the Gen'l Government." 2 Farrand at 27. Morris endorsed the solution put forth by Sherman as a less offensive means of ensuring the supremacy of federal law (*Id.* at 28 (emphasis added)):

> "[Morris] was more & more opposed to the negative. The proposal of it would disgust all the States. *A [state] law that ought to be negatived will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. law.*

This resolution included the central features of modern preemption doctrine. The federal judiciary had the duty to set aside state laws encroaching on federal powers. If the federal Courts failed in that duty, Congress could enact unquestionably preemptive legislation. Following this synthesis of the supremacy issue, the delegates rejected the congressional veto. 2 Farrand at 28.

Immediately after this vote, the Convention unanimously approved a new proposed resolution, which was the first version of the Supremacy Clause (2 Farrand at 22):

> Resolved that the legislative acts of the United States made by virtue and in pursuance of the articles of Union and all Treaties made and ratified under the authority of the United States shall be the supreme law of the respective States as far as those acts or Treaties shall relate to the

> said States, or their Citizens and Inhabitants – and that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding.

This resolution embodied the views of Madison, Wilson, Sherman, and Morris that federal law must be both supreme and enforced by the federal judiciary. *Id.* This provision also specifically expressed the delegates' distrust of state authority and especially state courts.

The next version of the Supremacy Clause emerged from the Committee of Detail on August 6, as Article VIII of the draft charter (2 Farrand at 183):

> The Acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States shall be the supreme law of the several States, and of their citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions; anything in the Constitutions or laws of the several States to the contrary notwithstanding.

As with the first draft, the principles contained in this provision were unanimously approved by the delegates. Article VIII drew little comment during the vigorous debate on the report of the Committee of Detail. *See* 2 Farrand at 380-395 (debating other provisions, but not Article VIII).

The final Committee of Style reported to the Convention on September 12. The Supremacy Clause now appeared as Article VI, and was little changed (2 Farrand at 603):

> This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

The final text thus continued to express the Framers' distrust of the states, especially state courts. The third clause specifically commands that "the judges in every state shall be bound" by the Supremacy Clause.

In a debate later that same day on the power of states to lay duties on trade, Madison repeated Gouverneur Morris' view that the federal judiciary must control the power of the states: "The jurisdiction of the supreme Court must be the source of redress. So far only had provision been made by the plan agst. injurious acts of the States." 2 Farrand at 589. That special responsibility resides in this Court still.

D. The Federal Structure Does Not Support a Presumption Against Preemption of State Law

The presumption in favor of state law cannot be justified as somehow supporting the structure of federal-state powers established by the Constitution. In the First Congress, Madison explained that as long as Congress exercised a delegated power under the Constitution, that power stands supreme (2 Annals of Cong. 1897 (1791) (quoted in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985))):

> Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States.[2]

During the ratification debates, Madison and Hamilton each stressed that the constitutional structure ensures federal supremacy, not any presumption in favor of state law. In Federalist No. 34, Hamilton argued that in any consolidation of states, the incorporated units necessarily surrender sovereignty (C. Rossiter ed. 172):

> If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for POLITICAL POWER AND SUPREMACY.

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[2] Consistent with this reasoning, the adoption of the Tenth Amendment in 1791 in no way modified the Supremacy Clause or the role of this Court in enforcing it. The Tenth Amendment confirms that Congress has limited powers, and non-delegated powers remain with the states and the people. The Supremacy Clause, on the other hand, operates when Congress has acted pursuant to its delegated powers.

See also J. Story, Commentaries on the Constitution 684 (employing Hamilton's language and making similar arguments).

Madison, in No. 44, also insisted the Supremacy Clause protected the federal-state structure. He pointed out that some state constitutions "invest the State legislatures with absolute sovereignty in all cases not excepted by the existing Articles of Confederation." The Federalist No. 44, C. Rossiter ed. 254. Without the Supremacy Clause, Madison observed, the Constitution would have been "radically defective" (*id.* at 255):

> In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to its parts; it would have seen a monster, in which the head was under the direction of the members.

The paramount purpose of the Supremacy Clause was to establish and preserve federal prerogatives. State governments, acting on local matters, warranted due respect. But the Framers intended to protect the federal "common loaf" from being sliced up by the states, each intent on its own "morsel." A presumption against preemption of state law tilts the Court's analysis of preemption and thwarts the Framers' intent that the Court apply federal law without bias in favor of, or against, state authority.

CONCLUSION

Justice Holmes wrote (O.W. Holmes, Collected Legal Papers, 291, 295-296):

> I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.

That concern guided the Framers in crafting the Supremacy Clause, and guides this Court in its enforcement. The presumption against preemption of state law, which has intermittently been recited in this Court's preemption decisions without careful analysis, should be abandoned as contrary to that fundamental national principle.

Respectfully submitted,

David Overlock Stewart
Counsel of Record
Thomas M. Susman
Matthew J. Marino
Ropes & Gray
1301 K Street, NW
Suite 800 East
Washington, DC 20005-3333
202-626-3900

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